


Commonwealth of Virginia		
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Elizabeth Palen, Executive Director		
Administrative Law Advisory Committee		

SUMMARY

Administrative Law Advisory Committee
October 23, 2012
12:00 PM
General Assembly Building
6th Floor, Speaker's Conference Room

Members Present: Christopher R. Nolen (Chair), Elizabeth Andrews, Jeffrey S. Gore, Katya Herndon, Thomas A. Lisk, Eric M. Page, Karen Perrine, Michael Quinan, and Alexander F. Skirpan, Jr.

Staff Present: Elizabeth Palen

I. Welcome and call to order

- **Christopher R. Nolen**, (Chair) called the meeting to order.
- **Mr. Nolen** explained that the objective of the meeting is to discuss judicial deference to agency decisions and standards of review. Mr. Nolen stated that Senator John S. Edwards raised the issues and provided the case of *James Robert Gordon v. Alcoholic Beverage Control* as one example.

II. Introduction and background of judicial discretion on litigated regulatory issues

- **Sen. Edwards (via telephone)** stated that he wished to provide more due process to the appeal of agency decisions in circuit courts.
 - **Sen. Edwards** directed the committee to Virginia Administrative Code (VAC) 2.2-4027 and explained how and when courts may grant deference to agency decisions.
 - **Sen. Edwards** stated that the individuals making judicial decisions within the agencies may not be qualified to do so. Sen. Edwards stated that courts may not be able to provide a consistent application of the law if forced to grant deference to arbitrary agency decisions. Sen. Edwards suggested that VAC 2.2-4027 be revised.

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- **Mr. Nolen** asked if there was a difference between the quality of decisions made by appointed boards as opposed to decisions made by a hearing officer and taken to an agency head.
 - Sen. Edwards stated that he was not aware of any difference between those two types of decisions, but stated that he believed some agencies have been given too much discretionary authority.
- **Michael Quinan** asked if the statute lacked a standard.
 - **Sen. Edwards** replied that the statute is unclear on courts' abilities to apply a substantial evidence test to agency rulings.
 - **Sen. Edwards** also stated that the last paragraph of the statute has been interpreted to mean that courts are to give full deference to agency decisions. Sen. Edwards stated that courts must be able to evaluate agency rulings consistently and rationally.
- **Thomas A. Lisk** agreed that the statute seemed confusing and stated that the interpretation of the VA Supreme Court ruling in *Virginia Real Estate Commission v. Bias* is that a court will grant deference if the agency's claims have factual support.
 - **Mr. Lisk** stated that this is not the same as a substantial evidence test and suggested that ALAC research what standards other states use in this instance.
 - **Mr. Lisk** stated that a separate issue is determining to what degree agencies should be awarded deference, but this would require an agency-by-agency review.
 - **Sen. Edwards** agreed that reviewing other states' standards would be a good idea.
- **Mr. Nolen** stated that ALAC will conduct research and review the Model APA for any relevant guidance on the issue.

III. Discussion and action to be taken

- **Mr. Quinan** stated that the statute is unclear because it begins with errors of law and ends with errors of fact.
 - Mr. Quinan stated that the standard of review based on agency expertise only applies to issues of fact, and the areas in which agencies have expertise may need to be defined.
- **Eric M. Page** stated that the question is whether an agency's interpretation of the law should be given deference.
 - Mr. Page stated that the Supreme Court has previously ruled that an agency's interpretation of its own regulations should be given great deference and this must be kept in mind when updating the statute.
- **Ms. Andrews** stated that deference should be given to areas of expertise under an agency's statutory authority and that removing all deference would have adverse effects.
 - **Mr. Quinan** agreed that agencies should be granted deference, but courts should also not be "rubber-stamping" agency decisions.
 - **Alexander F. Skirpan, Jr.** stated that it may be difficult to draw lines on what experience or specialized competence someone in an agency has.
 - **Mr. Lisk** stated that agencies should still receive deference, but agencies do not have the correct expertise in many instances.

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- **Jeffrey S. Gore** suggested that deference is important, but there may be a way to implement a process to rebut the presumption of expertise by the agency.
- **Mr. Quinan** stated that the problem may not be the language, but the fact that circuit courts are heavily burdened and grant deference to lighten work load.
- **Mr. Nolen** suggested conducting further research on these issues and discussing them in depth at the next meeting.
 - **Mr. Nolen** also raised the issue of emergency regulations to be discussed at the next meeting.

IV. Public comment

- **Mr. Nolen** invited public comment.
- **Mr. Nolen** relayed public comment on behalf of Jane Chaffin of the Code Commission.
 - **Mr. Nolen** explained that the Virginia Code Commission is looking to renew the contract for the print editions of the VAC.
 - **Mr. Nolen** asked the value of having a printed edition of the code, taking into account the fact that annotations are only included in the printed edition.
 - Several committee members stated that they first use the online version and then refer to the printed version to view annotations. The consensus of the committee was that the annotations are very useful and should be included in the online version.

V. Adjourn

- Hearing no further comment, **Mr. Nolen** adjourned the meeting.

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